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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

TASH HEPTING, GREGORY HICKS, CAROLYN JEWEL and ERIC KNUTZEN on Behalf of Themselves and All Others Similarly Situated, Plaintiffs, vs. AT&T CORP., et al., Defendants.	CASE NO. CV-06-0672-VRW REPLY MEMORANDUM IN SUPPORT OF MOTION BY LYCOS, INC. AND WIRED NEWS FOR ORDERS (1) PERMITTING INTERVENTION, AND (2) UNSEALING DOCUMENTS Hearing Date: June 23, 2006 Time: 9:30 a.m. Place: Courtroom 6, 17th Floor (Hon. Vaughn R. Walker) Complaint Filed: January 31, 2006

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INTRODUCTION

Rather than carrying its difficult burden of establishing that the Klein and Marcus declarations and exhibits should be redacted or sealed, defendant AT&T Corp. ("AT&T") attempts to distract from the question before the Court by attacking Wired News and the press. It is AT&T, not intervenors Lycos and Wired News, that has been accused of breaking the law. The only issue here is whether the public should see all of the materials that form the basis for plaintiffs' grave – and important – allegations against AT&T.

Indeed, now that the accusations of wrongdoing have been placed before the public, the documents should be unsealed no matter whether the Court dismisses the action on state secret grounds. The public should be permitted to decide on its own whether there is a basis for plaintiffs' claims, notwithstanding any governmental privilege that precludes court proceedings. An educated public may then act in other fora, including pressing for legislation and deciding, on an informed basis, whether to do business with AT&T.

There is no request here for "reconsideration," as AT&T contends. The Court has not made findings regarding the sealed documents, which it is obligated to do. The Court cannot delegate to the parties the decision as to what materials should be sealed. The Court's "status quo" retention of documents under seal and request that the parties consider redactions was only the first step of the analysis.

AT&T has not carried its burden of establishing that the documents are protected trade secrets, and, *even if it does,* AT&T's private interests must yield the far more important public interest in access to court proceedings involving the free speech and privacy rights of many millions of Americans. This is not a commonplace civil dispute. Plaintiffs are attempting to make out a case against AT&T based largely on the evidence provided by Klein (and apparently interpreted by Marcus), and the public is entitled to know whether Klein's evidence is what plaintiffs say it is: proof of a massive effort to intercept and monitor Internet and voice communications flowing through AT&T's main fiber-optic cables.

If the Court is not inclined to unseal the documents in their entirety, Lycos and Wired News request that the Court appoint a neutral technical advisor to assist the Court in determining whether any of the documents at issue contain trade secrets and, if so, what redactions are appropriate. While it is the Court that must decide whether AT&T has met its burden in the face of countervailing public interests favoring access, a technical advisor will help cut through AT&T's broad and unfocused assertions that these documents have commercial value that would be sacrificed if they are disclosed. "Technical" is not equivalent to "trade secret," and, given the importance of plaintiffs' allegations and the public's presumptive right of access, the Court should independently and carefully scrutinize the materials at issue – relying, if appropriate, on a neutral expert, and not on the self-serving assertions of AT&T.

ARGUMENT

I. AT&T'S OBJECTION TO INTERVENTION IS MERITLESS

AT&T offers no authority for its contention that intervention should be denied because other media organizations have sought leave to intervene or because others also desire to make the same documents public. [Docket No. 195 (Oppn. 1:2-13, 5:3-16).] The fact that two groups of intervenors sought sealed documents did not trouble the Ninth Circuit in Foltz v. State Farm Mutual Auto Ins. Co., 331 F.3d 1122, 1128-29 (9th Cir. 2003).[1] And the fact that AT&T's effort to keep the materials from the public has been inconvenient or prolonged is of no moment, as the Ninth Circuit made clear in San Jose Mercury News v. District Court, 187 F.3d 1096 (9th Cir. 1999):

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[1] AT&T's contention that the public's interest in access to the documents is adequately represented by plaintiffs ignores the record. Plaintiffs have filed numerous documents under seal and have agreed to redactions demanded by AT&T. It is intervenors' view that the Klein and Marcus declarations and the exhibits should be made available to the public in their entirety. [*See, e.g.,* Docket Nos. 138 (hearing transcript 24:20-25:6) (plaintiffs' counsel agreeing to redactions), 146-149 (redacted documents and cover letter, filed on May 25, 2006 without any showing by the parties of "compelling reasons" under common law or "good cause" under Rule 26(c)).]

> "[A]ssuming an intervenor does assert a legitimate, presumptive right to open the court record of a particular dispute, the potential burden or inequity of the parties should affect not the right to intervene but, rather, the court's evaluation of the merits of the applicant's motion to lift the protective order."

Id. at 1101 (quoting Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 787 (1st Cir. 1988)).

AT&T's overheated rhetoric about the media's publication of some of the sealed documents also falls flat, as explained immediately below. AT&T offers *nothing* in support of its accusations that Wired News (1) "willfully and repeatedly" "misappropriated and misused AT&T's property" and (2) "leak[ed] subsets of the information that the Court ordered remain under seal." [Docket No. 195 (Oppn. 6:9-19).]

Wired News did not violate any order. AT&T spends considerable time confusing the facts in the hope of prejudicing the Court against Lycos and Wired News. Wired News received the documents it published *prior* to the May 17, 2006 Order, as shown by AT&T's own submissions. [Docket Nos. 195 (Oppn. 2:17-3:2 (noting that key material was posted at *2 a.m.* on May 17, 2006)), 196-8 (Ericson Decl. Exh. G (May 17, 2006 article publishing Klein's statement and selections from the supporting documents)).] The remainder of the documents provided to Wired News were published on May 22, 2006, but they were in Wired News' possession before the May 17 hearing and order.

Further, the May 17, 2006 Order prohibits "*plaintiffs, their counsel, retained expert and consultant*" from disclosing the documents under seal. [Docket No. 130, at 1 (emphasis added).] The Order does not apply to nonparties. Indeed, at the hearing, the Court explicitly rejected AT&T's request for an order gagging Mark Klein, notwithstanding his, and plaintiffs' counsel's, acknowledgement that Klein had provided the documents to the news media. [Docket Nos. 111 (Klein amicus motion, 2:21-22), 138 (hearing transcript 21:24-22:6, 31:8-32:7).]

Moreover, an order prohibiting press disclosure of documents filed in this action (notwithstanding their sealed status) would have been patently unconstitutional. *See* Proctor & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 225-26 (6th Cir. 1996) (condemning district court's order enjoining Business Week from publishing information from sealed court documents).

Wired News did not "leak" or misappropriate AT&T property. Even assuming for the moment that trade secrets are involved here, AT&T offers not one scrap of information that would suggest that Wired News acquired or had knowledge that the documents were acquired by improper means, *i.e.*, "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means." Cal. Civ. Code §§ 3426.1. Even if Wired News could be charged with such knowledge, liability cannot be imposed based on "a stranger's illegal conduct" where the media discloses information of public concern. Bartnicki v. Vopper, 532 U.S. 514, 535 (2001).

AT&T's repeated assertion that Wired News "leaked" documents is just nonsense. Wired News did not obtain the documents from AT&T and has no duty of confidentiality to AT&T. The fact that AT&T has not made a peep of direct protest to Wired News or demanded that the documents be taken down and returned to AT&T disposes of this accusation.

Also frivolous is AT&T's claim that Wired engaged in "misconduct" by publishing documents that it lawfully obtained before the Court entered the May 17 Order (which did not even apply to Wired). [Docket No. 196 (Oppn. 1:19-23).] The situation is the opposite: Wired News, after lawfully publishing documents that it lawfully obtained, has come to the Court and asked for an order unsealing the remainder, because none of them should have been filed under seal. The media's publication of information received from a person who is alleged to have breached a duty of confidentiality does not strip the media of the right to seek and obtain relief from the courts. *See* New York Times Co. v. United States, 403 U.S. 713 (1971) ("Pentagon Papers") (rejecting injunction on newspaper publication of secret government study stolen by Daniel Ellsberg); Bartnicki, 532 U.S. at 533-34 (affirming dismissal of claims against media that broadcast tape of intercepted telephone conversation).

II. THE COURT MUST INDEPENDENTLY DETERMINE WHETHER SEALING IS PROPER, WITHOUT DEFERENCE TO ANY AGREEMENT BY THE PARTIES

AT&T asserts that Wired News and the other press intervenors are seeking reconsideration of matters already decided on May 17, 2006 and, consequently, it is the media's burden to show why the question should be revisited. [Docket Nos. 190 (Oppn. at 5:19-6:5), 160 (Oppn. to News Media Motion at 8:7-17).] This is not correct. As explained in Sections III and IV, AT&T has never met its burden, and it is not relieved of that task now simply because of developments on May 17. The Court, without reaching any press motion, chose to retain the "status quo" while the parties attempted to reach agreement on redactions, "until this matter can be further reviewed," and "pending further review of the situation and further order of the Court." [Docket No. 138 (hearing transcript 28:15-29:20); *see also* Docket No. 130 (May 17, 2006 Order).] Given this context, the May 17 Order is *not* a final "sealing order."

In fact, the May 17 Order cannot possibly be a final determination by the Court that the documents should be sealed, because it would violate the exacting standards for such a decision that are the law in this Circuit. The Klein and Marcus declarations and the exhibits were submitted in support of a motion for preliminary injunction which remains pending, notwithstanding the Court's decision to vacate the hearing date until it considers the motions of AT&T and the government.[2] These preliminary injunction papers

[2] Also, in urging the Court to consider the viability of their lawsuit prior to review of the government's confidential submissions, plaintiffs stated that could prove their case with (footnote continued)

raise issues that go to the heart of plaintiffs' claims and do not involve discovery; it is beyond reasonable dispute that *compelling* reasons must be offered by AT&T to redact them or keep them under seal. *See* Kamakana v. City & County of Honolulu, 447 F.3d 1172, 1179-80 (9th Cir. 2006) (comparing the "good cause" and "compelling reasons" standards). "When *sealing* documents attached to a dispositive pleading, a district court must 'base its decision on a compelling reason and articulate the factual basis for its ruling, without relying on hypothesis or conjecture.'" *Id.* (original emphasis) (quoting Hagestad v. Tragesser, 49 F.3d 1430 (9th Cir. 1995)).

Even if the less exacting "good cause" standard of Rule 26(c) applies (and it does not), there have been no particularized showing by AT&T and findings by the Court as to the stipulated redactions and the documents that remain under seal. *See* San Jose Mercury News, 187 F.3d at 1102 (requiring trial court to balance the "strong presumption in favor of access" against "sufficiently important countervailing interests . . ., basing its decision on compelling reasons and specific factual findings"); Foltz, 331 F.3d at 1131, 1138 (requiring, under Rule 26(c), a "'particular showing' of good cause" and "*specific* prejudice or harm" (original emphasis)); Contratto v. Ethicon, Inc., 227 F.R.D. 304, 307-08 (N.D. Cal. 2005) (requiring a business that raises trade secrets as a basis for sealing to make "specific demonstrations of fact, supported where possible by affidavits and concrete examples, rather than broad, conclusory allegations of harm").

Furthermore, the Ninth Circuit and federal courts throughout the nation have made clear that the parties cannot unilaterally stipulate to filing documents under seal; limitations on access to court documents are always subject to the oversight of the court. *See* San Jose Mercury News, 187 F.3d at 1101 ("The right of access to court documents belongs to the public, and the Plaintiffs were in no position to bargain that right away."); Kamakana, 447 F.3d at 1183 (court is not bound by agreement of the parties); *see also,*

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the Klein and Marcus declarations and exhibits. [No. 134 (plaintiffs' response to May 17, 2006 Order, 6:17-19).]

e.g., Baxter Int'l, Inc. v. Abbott Laboratories, 297 F.3d 544, 545-46 (7th Cir. 2002) (criticizing parties' stipulated agreement to file documents under seal); Proctor & Gamble, 78 F.3d at 227 (rejecting a protective order that "allows the parties to control public access to court papers").

The May 17, 2006 Order does not address any of the requirements for sealing under the First Amendment, the common-law "compelling reasons" test, or Rule 26(c). The Court cannot delegate to the parties the task of determining what should be redacted or sealed. The Court is required to consider AT&T's trade secret claims in detail and determine, with specific findings, whether AT&T has established that the documents contain, in fact, information that the law recognizes as trade secrets, and whether the public's interests outweigh any private interest of AT&T in keeping the documents under seal. *See* Kamakana, 447 F.3d at 1181-82.

III. AT&T CANNOT ESTABLISH THAT THE DOCUMENTS CONTAIN TRADE SECRETS AND ITS INTERESTS OUTWEIGH THOSE OF THE PUBLIC

AT&T contends that, because the documents in question have technical information, and because AT&T is a leader in splitting and cross-cutting fiber-optic cables, they necessarily contain trade secrets that should be kept under seal.[3] But rather than addressing the presumption of openness, and its obligation to not only establish that the documents are trade secrets *and* its interests outweigh those of the public, AT&T dismisses the First Amendment and settled common-law standards as "abstract legal principles" [Docket No. 195 (Oppn. 5:22-6:1)] and, in a breathtaking *non sequitor,* proceeds to attack Wired News' publication of documents that it lawfully obtained [*id.* (Oppn. 6:6-8:18)].

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[3] AT&T offers no authority for the proposition that it no longer needs to justify confidentiality. "[T]he proponent of sealing bears the burden with respect to sealing. A failure to meet that burden means that the default posture of public access prevails." Kamakana, 447 F.3d at 1182.

AT&T offers nothing specific in support of its trade secret claim, which is limited to a single paragraph of argument in a 10-page brief. [*Id.* (Oppn. at 9:11-21).] Those documents that have been published reveal traditional fiber-optic splitting technology; what is unusual here is the fact that AT&T is splitting the cables and routing them to a room controlled by the United States government. If the information in the sealed documents has commercial value that depends on its secrecy, AT&T should be able to explain this by *public* expert declaration.

Such a declaration need not itself disclose trade secrets. At minimum, it can place in context the technical materials, describe their purpose, confirm that the information in the documents is not known to AT&T's competitors, and describe the likely impact on AT&T if the materials are disclosed to the public. If the facilities and equipment described by Klein have purely commercial value, and were not installed to facilitate eavesdropping by the National Security Agency, this can be stated in the declaration. The government has *not* asserted a claim of national security privilege as to the Klein and Marcus declarations and exhibits; if the installation described by Klein is benign, AT&T can certainly state this.[4] While AT&T correctly points out in its opposition that the government's state secret claim is separate from AT&T's claim that these documents contain trade secrets, it is AT&T that is using the national security question to confuse the issues and avoid meeting its burden under the "compelling reasons" standard. [Docket No. 195 (Oppn. 9:16-21).]

Careful consideration of AT&T's arguments also reveals that its justification for secrecy has shifted from a dubious reference to terrorists and hackers, to "fiber-optic splitting and cross-cutting technology" – which is certainly known to other telecommunication companies, notwithstanding AT&T's bald claim that it has "a substantial lead" in the area. The Court should, as did Judge King in California v. Safeway, Inc., 355 F. Supp. 2d 1111 (C.D. Cal. 2005), "drill down" past AT&T's broad and unfocused assertion of trade secrets. *Accord* Contratto v. Ethicon, Inc., 227 F.R.D. 304, 308-09 (N.D. Cal. 2005). Aptly stated by the Seventh Circuit in a trade secrets misappropriation case, "It is not enough to point to broad areas of technology and assert that something there must have been secret and misappropriated. The plaintiff must show *concrete secrets*." Composite Marine Propellers, Inc. v. Van Der Woude, 962 F.2d 1263, 1266 (7th Cir. 1992) (emphasis added).

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[4] That AT&T is more concerned about embarrassment than protecting trade secrets is confirmed by its insistence on stipulated redaction of information from the Klein Declaration [No. 147] that AT&T has *publicly filed* in opposition to intervention by the news media. [*See* No. 196-10, at 2-21 (Ericson Decl. Exh. I (Klein statement posted on Wired News)).] *That public filing alone requires the Court to reject the redactions submitted by the parties on May 25, 2006.*

AT&T's proposition that the discussion ends when it raises a claim of trade secrets has been consistently rejected by the courts. Most recently, in O'Grady v. Superior Court, 2006 WL 1452685 (May 26, 2006), the California Court of Appeal found that the First Amendment-based journalists' privilege protected bloggers who posted internal Apple Computer, Inc. documents describing an unreleased product. Like here, Apple contended that the documents were stolen trade secrets and "the public has no right to know a company's trade secrets." *Id.* at *34. The Court of Appeal held that the public's interest must be considered, and commercial concerns may often have to yield:

> As recent history illustrates, business entities may adopt secret practices that threaten not only their own survival and the investments of their shareholders but the welfare of a whole industry, sector, or community. Labeling such matters "confidential" or proprietary" cannot drain them of compelling public interest. Timely disclosure might avert the infliction of unmeasured harm on many thousands of individuals, following in the noblest traditions, and serving the highest functions, of a free and vigilant press. It therefore cannot be declared that publication of "trade secrets" is *ipso facto* outside the sphere of matters appropriately deemed of "great public importance."

Id.

The court found that the Legislature's recognition of a property-like right in information "cannot blind courts to the more fundamental judgment . . . that free and open disclosure of ideas and information serves the public good." Where speech and trade secrets cannot both be accommodated, "it is the statutory quasi-property right that must give way, not the deeply rooted constitutional right to share and acquire information." *Id.*; *cf.* Gonzales v. Google Inc., 234 F.R.D. 674, 685 (N.D. Cal. 2006) (observing that there is "no absolute privilege for trade secrets and similar confidential information"); Kamakana, 447 F.3d at 1185 (rejecting categorical protection; "even the documents we have identified as 'traditionally kept secret' are not sacrosanct").

Where the rights of speech and privacy, and public access to the courts, weigh overwhelmingly in favor of disclosure, any statute-based property right of AT&T must yield.[5] Thus, even if the redacted and sealed documents contain trade secrets, the Court should lift the seal and make the materials available in their entirety.

IV. AT&T'S CLAIM OF TRADE SECRETS SHOULD, AT MINIMUM, BE EXAMINED BY AN IMPARTIAL EXPERT

AT&T hopes that the Court, seeing the documents as "technical" in nature, will conclude that they must contain trade secrets. But "technical" is not equivalent to "information . . . that derives independent economic value . . . from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use." Cal. Civ. Code § 3426.1(d).

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[5] This is true even if the Court dismisses the action. *See* Kamakana, 447 F.3d at 1182, 1187 (affirming orders unsealing documents in settled action); Wilson v. American Motors Corp., 759 F.2d 1568, 1570-71 (11th Cir. 1985) (public access is vital to insuring the "integrity of the system" even where the action was settled prior to verdict (citing Brown &Williamson Tobacco Corp. v. FTC*,* 710 F.2d 1165, 1179 (6th Cir. 1983))); Chicago Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1314-15 (11th Cir. 2001) (even where "good cause" standard applies to trade secrets in settled case, court must balance private interests against public interest in disclosure).

A district judge has the inherent power to appoint a technical advisor to assist with the review of technical evidence. Association of Mexican-American Educators v. California, 231 F.3d 572, 590 (9th Cir. 2000) (*en banc*); Techsearch, LLC v. Intel Corp., 286 F.3d 1360, 1377 (9th Cir. 2002). Given the gravity of the allegations made in this lawsuit, and the important rights that are implicated both by the litigation and the effort by AT&T to keep documents under seal that are the centerpiece of the plaintiffs' claims, the Court should consider appointing a neutral technical advisor. The advisor might examine the documents in question and assist the Court in determining whether the materials are trade secrets. *See, e.g.,* Techsearch, 286 F.3d at 1377 (technical advisor approved for patent case; "it cannot be expected that trial judges will have expertise in biotechnology, microprocessor technology, organic chemistry, or other complex scientific disciplines"); Regents of the Univ. of Cal. v. Micro Therapeutics Inc., 2006 WL 1469698 (N.D. Cal. May 26, 2006) (appointing technical advisor in patent case).

The Court should lift the seal on the Klein and Marcus declarations and exhibits, in their entirety. Alternatively, the Court should consider appointing a technical advisor to assist in identifying any trade secrets in the documents, preliminary to an evaluation by the Court of the countervailing public interest favoring disclosure.

CONCLUSION

For the foregoing reasons, as well as those stated in the moving papers and the papers submitted by the other media intervenors, Lycos, Inc. and Wired News request

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that the Court grant its motion to intervene and to unseal the Declaration of Mark Klein and Exhibits A-C (Docket No. 31), and the Declaration of J. Scott Marcus (Docket No. 32).

DATED: June 19, 2006

Respectfully submitted,

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